86-808

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALBERT MARCHINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FROM APPEAL NO. 84-1279
DISTRICT COURT NO. CR-LV-84-15-01
(District of Nevada—Las Vegas)

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court committed prejudicial and reversible error in admitting into evidence the grand jury testimony of the defendant's wife, Kathleen Snyder Marchini.

2. Whether it was reversible error for the trial court to admit into evidence the testimony of the "expert summary witness", Internal Revenue Agent Russell W. Olsen, and to admit into evidence Government's Trial Exhibit 57, a summary prepared by Mr. Olsen.

3. Whether the trial court committed plain error in the giving of a premature and coercive Allen jury instruction.

ABBREVIATIONS USED IN THE TEXT

The abbreviation "RT" stands for the Reporter's Transcript of proceedings. Thus, for example "RT 224-234 (7/17/84)" refers to the excerpt at pages 224 through 234, of the Reporter's Transcript of the proceedings of August 17, 1984 in the District Court below.

Abbreviation "CR" stands for "Clerk's record", and the number following such abbreviation indicates the docket control number of a given document. Thus, for example, "CR 1" (the Indictment) means the document with control number 1 on the docket sheet.

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE NINTH CIRCUIT

The petitioner, Albert Marchini, respectfully petitions this Court to issue its Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, which opinion was issued August 18, 1986 and affirms the judgment of the United States District Court in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit, dated August 18, 1986, is set forth in full in Appendix A hereto. A timely petition for rehearing on behalf of the petitioner Albert Marchini was reviewed by the Court of Appeals in this case. That petition for rehearing was denied by order dated September 22, 1986. A copy of that order is attached hereto as Exhibit B. Accordingly, by Rule 20.4 of the Supreme Court Rules, the instant petition for a writ of

certiorari is timely.

JURISDICTION

The jurisdiction of this Court upon this petition for writ of certiorari is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment VI (including right of defendant to confront adverse witnesses): The complete text of the Sixth Amendment is set forth in Appendix C hereto.

Title 26, United States Code, Section 7206(1), which provides as follows:

> "Any person who--
>
> (1) Declaration under penalties of perjury.--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;
>
> . . .
>
> . . .

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution."

And Rule 804(a)(1) and (b)(5) of the Federal Rules of Evidence:

"(a) Definition of unavailability

"'Unavailability as a witness' includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement;

. . .

"(b) Hearsay exceptions

"The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . .

(5) Other exceptions

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

STATEMENT OF THE CASE

The appeal before the Ninth Circuit below was from the final judgment of conviction (CR 72) of the defendant Albert Marchini ("Mr. Marchini"), which judgment is dated September 7, 1984, and was entered September 17, 1984, in Case No. CR-LV-84-15-01, in the United States District Court for the District of Nevada, the Honorable Justin L. Quackenbush (visiting from the Eastern District of Washington), Judge Presiding. The trial below was on a 16-count Indict-

ment (CR 1), filed January 31, 1984, in the United States District Court in Las Vegas, Nevada. The only offense charged by the Indictment was alleged violation of 26 U.S.C. Sec. 7206(1), which proscribes the wilful making and subscribing of any "return, statement, or other document" which is verified by a statement that it is made under the penalties of perjury, and which the maker does not believe to be true and correct as to every material matter. In the first 12 counts of the Indictment, it was alleged that for each of the calendar quarters from the fourth quarter of 1977 through the third quarter of 1980, the defendant Albert Marchini "willfully and knowingly" made and subscribed a United States Employer's Quarterly Federal Tax Return, Form 941, on behalf of Marchini Construction Company, Inc., in violation of 26 U.S.C. Sec. 7206(1) in that the return

substantially underreported total wages subject to withholding. In the latter four counts, it was alleged that for each of the calendar years 1977 through 1980, the defendant Albert Marchini "willfully and knowingly" made and subscribed a United States Employer's Annual Federal Unemployment Tax Return, Form 940, on behalf of Marchini Construction Company, Inc., in violation of 26 U.S.C. Sec. 7206(1) in that the return substantially underreported total taxable wages. The trial below was to a jury, and took place during July 16-19, 1984. The jury verdict was returned July 19, 1984. By that verdict, the defendant, Mr. Marchini, was found not guilty on Count I, but guilty on the remaining 15 counts of the Indictment.

As noted, the trial began on July 16, 1984. In the afternoon of that date, the trial court took note of the inten-

tion of the prosecution to call as a witness Ms. Kathleen Snyder Marchini (formerly Kathleen Anne Snyder), the wife of the defendant. (See RT 151-152 (7/16/84).) The Court, per Judge Quackenbush, however, stated its understanding of the law that there was applicable to Ms. Marchini a marital privilege whereby she could refuse to testify under these circumstances, and also a privilege covering all confidential marital communications. Thereafter, a hearing was held on the issue of the marital privilege as articulated in Trammel v. United States, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) and other authority. That hearing is recorded at RT 224-234 (7/17/84). At the conclusion of that hearing, the District Court concluded, and ruled, that the above privileges were indeed applicable, and that Kathleen Snyder Marchini could invoke the privilege to refuse to

give testimony for the prosecution. Having so ruled, the District Court held further hearing, devoted to the issue of whether Rule 804 (b)(5) of the Federal Rules of Evidence [Fed.R.Evid.] was available to permit the admission into evidence of Kathleen Marchini's grand jury testimony of June 22, 1982 (given prior to her marriage to the defendant in February of 1983), in lieu of her live testimony. (See RT 234-247 (7/16/84).) This hearing raised questions not only of compliance with the stringent requirements of the residual exception to the hearsay rule embodied in Fed.R.Evid. Rule 804(b)(5), in terms of "indicia of trustworthiness" sufficient to make the proffered evidence at least as trustworthy as evidence admissible under the other paragraphs of Rule 804(b), but also raised questions of possible violation of the Confrontation Clause of the Sixth

Amendment. After consideration of the matter, the trial court ruled on July 17, 1984 (at RT 5 (7/17/84) that portions of Kathleen Snyder Marchini's testimony could be read into the record in open court, before the jury, in lieu of her oral testimony. It is the view of the petitioner, however, that this ruling was prejudicial and reversible error, because Kathleen Snyder's testimony before the grand jury was not only based upon sketchy personal knowledge on her part, but was inevitably colored by a state of anxiety in her mind, and an overriding desire on her part to exculpate herself in what was obviously a far-reaching internal revenue investigation, focusing, in particular, on Marchini Construction Company and its payroll procedures, in which she played a role. And significantly, Kathleen Snyder was unprotected by any grant of immunity. (RT

226:4-8 (7/16/84).) Moreover, in the grand jury room there was no opportunity for Mr. Marchini or his counsel (or any other person) to confront or to cross-examine any witness. As a result, the decision to admit passages from the transcript of the grand jury testimony of Kathleen Snyder was constitutionally in error, and, in the petitioner's view, the Ninth Circuit's upholding of the District Court's ruling in this regard should be reversed by the Supreme Court. (See Part I of the "Reasons for Granting the Writ", below.)

During the trial, the prosecution presented the testimony of one Russell W. Olsen, who identified himself as a Revenue Agent for the Internal Revenue Service. Mr. Olsen's testimony (set forth at RT 123-154 (7/17/84)) was expressly predicated upon his having heard the testimony of the previous government

witnesses in this case, and upon his having reviewed the exhibits introduced by the prosecution. RT 124:6-125:1 (7/17/84). And at RT 125:2-126:8 (7/17/84), Mr. Olsen, on direct examination, testified that, based upon the testimony that he had heard, and certain exhibits which had previously been introduced into evidence, he had reached a conclusion as to whether wages had been omitted from the Form 941 and the Form 940 tax returns filed by the Marchini Construction Company for the periods in question, and he (Mr. Olsen) had concluded that wages were omitted from the said Form 941 and Form 940 tax returns for each of the years 1977, 1978, 1979, and 1980. The problem with the testimony of Mr. Olsen, however, was its tendency to usurp and preempt the deliberations of the jurors, and thereby to infringe upon the rights of the defendant Albert Marchini to a fair trial by a

jury of his peers. In effect, Mr. Olsen was holding himself out to the jury as an omniscient witness who was somehow qualified to weigh and analyze for the jury the testimony and evidence that already had been placed upon the record, and based upon such analysis, to advise the jury in summary and conclusory fashion what testimony to believe and how to return the verdict in this case. The presentation of such summary testimony by Mr. Olsen, a witness with the backing of the Federal Government, served only to create a strong disincentive in regard to jury deliberations, tending to suppress such deliberations, and depriving Mr. Marchini of his consitutional right to be tried by a jury of his peers, unfettered in their deliberations. (See Part II of the "Reasons for Granting the Writ", below.)

Moreover, there was yet another factor

in this case which tended to restrict deliberations. In the afternoon of July 18, 1984, the jury retired to deliberate. The next day, after the jury had deliberated only approximately four hours and 40 minutes, the District Judge delivered an Allen charge to the jury. That instruction is set forth at RT 342-347 (7/18-19/84). It is the position of the petitioner that this instruction was not only unnecessary, but deleterious to the rights of Mr. Marchini to a fair trial by a jury unfettered in its deliberations. The error in that instruction was threefold, in that (1) it stressed the cost and expense of the trial, in time, effort and money (RT 342:21-25 (7/18-19/84); (2) it was given prematurely in any event; and (3) it was so lengthy and elaborate that it inexorably had the effect, by virtue of the authority and prestige of the federal court, of overbearing the wills of the

jurors, and causing them to join in the verdict of the majority simply for the sake of arriving at some verdict. (See Part III of the "Reasons for Granting the Writ", below.)

Mr. Marchini was sentenced on September 7, 1984. On Count II he was sentenced to a term of two (2) years of imprisonment. On the remaining counts III through XVI, the imposition of sentence as to the imprisonment was suspended and he was placed on probation for a period of five (5) years, the probationary period to commence at the completion of the term of imprisonment imposed on Count II. Additionally, certain special conditions of probation were imposed, relating to restitution of funds to the Government, the payment of the costs of prosecution, and the rendition of community service.

Statement of the Facts

By way of background, Albert Marchini, approximately 45 years of age at the time of trial, was at that time a resident of Warwick, New York, where he resided with his wife and five children. RT 166 (7/18/84); RT 49 (9/7/84). For some 21 years prior to that time, however, he was a resident of the area of Las Vegas, Nevada. RT 166 (7/18/84). In 1968, as a building contractor, he formed a company known as Marchini Construction Company, Inc., of which he was the principal owner. RT 167 (9/7/84). In the middle 1970's, the company was largely concerned with framing work as a subcontractor, and had contracts with major builders on large projects. RT 167 (7/18/84). In particular, in 1976-1977, the Marchini Construction Company bid successfully on a project in Hawaii for the framing on 1,356 apartment units for

the Army Corps of Engineers. RT 169 (9/7/84). More generally, the Marchini Construction Company provided employment to approximately 100-300 employees in an extremely competitive milieu. RT 136 (7/16/84); RT 169 (7/19/84). The competitiveness in the building industry extended to the matter of hiring good employees. RT 137:25-140:9 (7/16/84); RT 188:1-4 (7/18/84). Mr. George Neil Alexander, who was employed by the Marchini Construction Company as a bookkeeper during 1977-1980, testified that he was a party to discussions within the company of the necessity of paying cash to employees in order to remain competitive. RT 138:22-140:9 (7/16/84). This was corroborated by the testimony of Robert Edward Chmielewski, who, during the approximate period of 1972-1981, was employed by the Marchini Construction Company. RT 184:4-16 (7/16/84). Moreover, Ms. Kathleen

Anne Snyder, who, in approximately 1975-1979, handled certain payroll responsibilities for Marchini Construction Company, stated in her grand jury testimony read in open court below that many employees would not work unless they received cash payments from their employer, and for that reason, Mr. Marchini made such payments to employees. RT 31:23-32:7 (7/17/84). Furthermore, both the testimony of Mr. Chmielewski and that of Ms. Snyder negated any inference that Mr. Marchini ever paid cash to employees for any other reason, such as to save on taxes. RT 185:3-6 (7/16/84); RT 32:5-7 (7/17/84).

Mr. Marchini, in his courtroom testimony, forthrightly acknowledged that some cash payroll disbursements were made to employees of Marchini Construction Company, but steadfastly denied any willful wrongdoing, either in allowing or causing

such payments to be made, or in the reporting of total wages on the Form 940 and Form 941 employer's federal tax returns filed by Marchini Construction Company. Mr. Marchini's testimonmy reflected a situation wherein any payments of cash to employees along with their payroll checks were made only in order to allow Marchini Construction Company to survive in its intensely competitive industry. See RT 32 (7/17/84); RT 180:19, et seq. (7/18/84). Significantly, Mr. Marchini testified that in connection with the Hawaiian operations of Marchini Construction, none of the company's employees were paid cash as any part of their wages, as there was no need to do so. RT 180:7-11. There was no need to do so because the employees' pay involved was simply in the form of hourly union wages (as opposed to compensation on a piecework basis). See RT 180, et seq.

(7/18/84). Moreover, for purposes of handling and reporting the payroll for the Hawaiian operations, a separate federal taxpayer identification number was taken out, for Marchini Construction Company, Hawaii Division. RT 178-179 (7/18/84). This, it is submitted, evidenced the good faith of Mr. Marchini in complying with the federal tax reporting requirements of an employer.

Moreover, while there was some testimony that wages of employees of Marchini Construction Company were sometimes paid in the form of 50% check and 50% cash, there was other testimony to establish that such was by no means the case at all times. Such testimony was given, for example, by Mr. George Neil Alexander, at RT 108:17-21 and at RT 131:23-132:4 (7/16/84). In the latter passage, Mr. Alexander testified that pursuant to discussions within Marchini Construction

Company, a decision was made in 1979 not to make any more cash payroll payments, and that in fact, such payments were in fact stopped, at least for a period of time. And Mr. Jeffrey Goodale, a carpenter employed by Marchini Construction Company, testified that approximately half the time he received his pay entirely in the form of check, while at other times, he received no more than 50% cash with his pay. See RT 286, et seq. (7/17/84).

Mr. Robert Chmielewski, in reference to the time that he worked for the Marchini Construction Company, stated directly the reason that cash payments to construction workers were at times made. Speaking at RT 170:7-18 (7/16/84), he stated:

"Q When you were talking with the employees, did they solicit all cash?

"A All the time.

"Q They wanted to be paid cash?

"A Yes, sir.
"Q Who do you recall?
"A Through the years I probably had over 300 or 400 carpenters working for us [i.e., Marchini Construction Company], and if we didn't pay them cash, they wouldn't work for us.
"Q Was it, then, your decision to pay cash?
"A Not so much mine. It was more of the standard trend of what was going on in the construction trade."

Moreover, Mr. Chmielewski's testimony demonstrated his considerable past experience in the construction industry. See RT 170:19, et seq. (7/16/84).

In summary, Mr. Marchini's actions with respect to the circumstances of this case reflect his good-faith response to a difficult set of circumstances wherein it was necessary for his company to hire and retain skilled and qualified employees, and at the same time to comply with the pay and benefit requirements of the labor union. See RT 178-185 (7/18/84). Accordingly, it is submitted that the totality

of the testimony and evidence in this case shows that Mr. Marchini never harbored any willful intent to commit a violation of 26 U.S.C. Sec. 7206 with regard to the reporting of wage payments to the Federal Government.

In or about early 1975, Ms. Kathleen Anne Snyder became employed with Marchini Construction Company, Inc. RT 21-22 (7/17/84). While in the employ of that company, she handled various routine clerical and secretarial duties. RT 22 (7/17/84). She left her position there in or about 1978, because of lack of work and the fact that Mr. Marchini was at that time phasing out his framing business. RT 26 (7/17/84). Later, in February of 1983, Ms. Snyder married Mr. Marchini, and was married to him throughout the trial and related proceedings below. (See RT 161, 240 (7/16/84).)

REASONS FOR GRANTING THE WRIT

I. THE RULING OF THE TRIAL COURT ADMITTING INTO EVIDENCE THE GRAND JURY TESTIMONY OF THE DEFENDANT'S WIFE, KATHLEEN SNYDER MARCHINI, UNREASONABLY DENIED TO THE PETITIONER HIS RIGHT OF CONFRONTATION, AND DEPRIVED HIM OF A FAIR TRIAL; THE JUDGMENT OF THE NINTH CIRCUIT UPHOLDING THAT RULING OF THE TRIAL COURT SHOULD BE REVERSED.

In view of the marriage of Kathleen Snyder to Albert Marchini, the District Court determined that there was applicable, as between Albert Marchini and Kathleen Snyder Marchini, not only the privilege against disclosure of confidential marital communications, but the privilege of Kathleen Snyder Marchini to refuse to testify against her husband. Hearings were held on the matter of the marital privilege, and those proceedings are transcribed at RT 151-154 (7/16/84)

and at RT 224-234 (7/16/84), and the District Court's ruling on the applicability of the privilege is at RT 233-234 (7/16/84). Defense counsel Michael T. Kenney apprised the District Court that Kathleen Snyder Marchini intended to invoke the marital or spousal privilege. RT 231:10-14 (7/16/84). The trial court then determined that Kathleen Marchini was "unavailable" as a witness, within the meaning of Fed.R.Evid. Rule 804. RT 234-235 (7/16/84). It should be noted that defense counsel Michael T. Kenney advised the Court that Kathleen and Albert Marchini had lived together throughout their marriage, and that they had (at the time of the trial) a four-month-old son. RT 232 (7/16/84). Accordingly, the District Court took note, at RT 233 (7/16/84), that it was acknowledged by all the parties that the marriage was bona fide. See, in particular, RT 233:19-20

(7/16/84).

The District Court then ruled that in lieu of Kathleen Snyder's live testimony, certain of her testimony before the Grand Jury on June 22, 1982 would be permitted to be read before the jury in open court, under the (claimed) authority of Fed.R. Evid. Rule 804(b)(5). RT 234-247 (7/16/84); RT 3-5 (7/17/84).

The petitioner Albert Marchini respectfully submits that the ruling and opinion of the Court of Appeals for the Ninth Circuit, upholding the District Court's allowance of the prior grand jury testimony of Kathleen Marchini to be read into evidence at the trial below, were in error, in particular, in that Albert Marchini was deprived of his Sixth Amendment Right of Confrontation, and thus was not accorded a fair trial, so that the decision and Judgment of the Court of Appeals should be reversed.

A. Standard of Review

A decision by a trial court as to whether to admit a hearsay statement under Fed.R.Evid. Rule 804(b)(5) is a ruling concerning the relevancy and materiality of evidence, and thus, as a general rule, the applicable standard of appellate review of such a decision is whether the trial court abused its discretion. Page v. Barko Hydraulics, 673 F.2d 134, 140 (5th Cir. 1982); cf. United States v. Poland, 659 F.2d 884, 895 (9th Cir. 1981).

However, in the instant case, there is an additional dimension to the matter of appellate review of the District Court's ruling admitting the prior grand jury testimony. For admission of a hearsay statement may be in violation of the Confrontation Clause of the Sixth Amendment, even if that statement is in conformity with the tests prescribed by

Fed.R.Evid. Rule 804(b)(5). United States v. Yates, 524 F.2d 1282, 1285-1287 (D.C.Cir. 1975). Any such error is reversible unless harmless beyond a reasonable dount. Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17L.Ed.2d 705 (1967); United States v. Bienvenue, 632 F.2d 910, 914 (1st Cir. 1980).

Moreover, in regard to the "abuse-of-discretion" standard, it has been judicially recognized that evidentiary questions on which the trial court's decision does not depend upon the first-hand observations of the trial judge are more freely reviewable than others. Thus, for example, in United States v. Criden, 648 F.2d 814 (3rd Cir. 1981), the Court of Appeals, speaking at 817-818, remarked:

"The mere statement that a decision lies within the discretion of the trial court does little to shed light on its reviewability. It means merely that the decision is uncontrolled by fixed principles or rules of law. See Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L.Rev. 635, 636-43 (1971). See also material compiled in R. Aldisert, The Judicial Process 742-46 (1976). In our judicial system, a wide variety of decisions covering a broad range of subject matters, both procedural and substantive, is left to the discretion of the trial court. The justifications for committing decisions to the discretion of the court are not uniform, and may vary with the specific type of decisions. Although the standard of review in such instances is generally framed as 'abuse of discretion,' in fact the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance.

. . .

"[D]iscretion is sometimes committed to the discretion of the trial judge because of pragmatic considerations. When circumstances are either so variable or so new that it is not yet advisable to frame a binding rule of law, trial courts may be given discretion until the factors important to a decision and the weight to be accorded them emerge from the montage of

fact patterns which arise. See Rosenberg, supra, at 662-63.

Often, in time, the contours of a guiding rule or even principle may develop as courts begin to identify the policies which control. . . ."

Moreover, the Court in Criden, at 818, also took note of the various factors pointing up the undesirability of open-ended or unfettered discretion, including "the concern that commitment to discretion may be antithetical to consistency of treatment, a major ingredient of justice", and "the general feeling that the losing litigant should not be deprived of at least one opportunity for review of each significant ruling made by a single judge".

And at 818, the Court in Criden declared:

". . . Thus, where the basis for commitment of a decision to a trial court's discretion is not dependent on its observation or familiarity with the course of the litigation, there are less compelling reasons for limited appellate re-

view."

And in United States v. Fierson, 419 F.2d 1020 (7th Cir. 1969), the Court of Appeals dealt with considerations in the admissions or exclusion of evidence in a context somewhat instructive in the case at bar, namely, that of evi-dence of prior criminal acts of an accused. In its analysis, the appellate court in Fierson, speaking at 1022, observed:

> "Admissibility of this type of evidence is subject to knowable, yet necessarily imprecise standards. At its roots the problem is one of balancing probative value against prejudice. Roe v. United States, 316 F.2d 617 (5th Cir. 1963). . . . The term 'discretion' means only that no hard and fast rules are laid down. It does not mean that the trial court's decision is immune from review."

Adverting to the case at bar, it will be noticed that Fed.R.Evid. Rule 804(b)(5), by its own terms as well as the applicable case law, prescribes

certain determinations that should inform the Court's decision on a question of whether or not to admit proffered evidence under the "catchall" hearsay exception in cases of "unavailability", and that the considerations set forth in Rule 804(b)(5)(A), (B), and (C) do indeed impose structure on, and restrict, the exercise of a trial court's discretion. Also, significantly, the prior grand jury testimony of Kathleen Snyder, as proffered below, was embodied in a "cold record" set forth in a transcript, rather than in the form of live testimony, and as a result, the admissibility of that testimony was not determined by any firsthand observations of the trial court, either of a witness testifying or proceedings in the litigation. As a result, the discretion reposed in the trial court in deciding whether or not to admit that testimony under Rule 804(b)(5)

should have been accorded an active, and more stringent appellate review, rather than review according to a passive, laizzez-faire approach by the Court of Appeals. Criden, supra, at 648 F.2d 817-818; Fierson, supra, at 419 F.2d 1022.

B. Analysis

Rule 804(b)(5) of the Federal Rules of Evidence provides that a hearsay statement not otherwise rendered potentially admissible by one of the other exceptions to the hearsay rule in Rule 804(b), but having "equivalent circumstantial guarantees of trustworthiness" equivalent to those of statements admissible under such other exceptions, is not excluded by the hearsay rule if the declarant is unavailable as a witness, and if the Court determines that "(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than

any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules [the Federal Rules of Evidence] and the interests of justice will best be served by admission of the statement into evidence." (Emphasis supplied.)

The matter of proper interpretation of the provisions of Rule 804(b)(5) is elucidated in United States v. Thevis, 665 F.2d 616 (5th Cir. 1982), at 629, where the Court of Appeals stated:

> ". . . The Senate Judiciary Committee's report on the Federal Rules of Evidence stated that the 804(b)(5) residual exception was to be used only rarely, in truly exceptional circumstances. Corroborated grand jury testimony which for one reason or another is unavailable at trial is neither rare nor exceptional, and in our opinion its general admission under this theory would constitute a 'major revision' of the hearsay rule that, as the Senate Judiciary Committee admonished, is for the legislature, not the judiciary. Grand jury testimony, although given under oath, is not subjected

to the vigorous truth testing of cross-examination, as is prior testimony."

The Senate Judiciary Committee report referred to by the Court of Appeals in Thevis is Report No. 93-1277, of the 93rd Congress, 2nd Session, filed October 11, 1984, to accompany H.R. 5463. In that report, the Committee stated, at page 19:

"The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.

"Therefore, the committee has adopted a residual exception for Rules 803 and 804(b) of much narrower scope and applicability than the Supreme Court version.

. . .

"It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize

> major judicial revisions to the hearsay rule. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule."

Moreover, as noted in Thevis, supra, at 628-629:

> "Both the wording of the Rule and the legislative history indicate that Congress intended evidence to be admitted under 804(b)(5) only if the reliability of the evidence equals or exceeds that of the other exceptions in Rule 804(b).

Where the evidence offered under Fed.R.Evid. Rule 804(b)(5) is a transcript by a declarant whose transcribed statement is not sufficiently based upon personal knowledge, the transcript should not be admitted under that residual exception. Fong v. American Airlines, Inc., 626 F.2d 759, 762-763 (9th Cir. 1980).

According to the Court of Appeals in

Fong, supra, at 763, in reference to Fed.R.Evid. Rules 803(24) and 804(b)(5):

> ". . . This exception is not to be used as a new and broad hearsay exception, but rather is to be used rarely and in exceptional circumstances. United States v. Kim, 595 F.2d 755, 765 (D.C.Cir. 1979). To admit a statement under the residual exception, the trial court must find the existence of five factors. Most importantly, the statement must have circumstantial guarantees of trustworthiness equivalent to those present in the traditional exceptions to the hearsay rule. United States v. Hoyos, 573 F.2d 1111, 1116 (9th Cir. 1978); United States v. Mathis, 559 F.2d 294, 298 (5th Cir. 1977)."

The appellate court in Fong concluded that the trial court had properly excluded the proffered hearsay statement. Id. at 762-763.

And according to the Court of Appeals in United States v. Heyward, 729 F.2d 297 (4th Cir. 1984), at 299:

> ". . . We are mindful that Rule 804(b)(5) was not written to be used as a 'new and broad hearsay exception,' Fong v. American Airlines, Inc., 626 F.2d

734, 763 (9th Cir. 1980), but was meant to be 'invoked sparingly.' Robinson v. Shapiro, 646 F.2d 734, 742 (2d Cir. 1981). Accord Huff v. White Motor Corp., 609 F.2d 286, 291 (7th Cir. 1979). . . ."

The appellate court in Heyward upheld the refusal of the trial court to admit the proffered statement into evidence under the residual exception of Rule 804 (b)(5). Heyward, supra, at 299.

In United States v. Love, 592 F.2d 1022 (8th Cir. 1979), the Court of Appeals reversed the defendant Love's Mann Act conviction because of erroneous admission by the trial court of her hearsay statement to an FBI agent, which statement was held inadmissible under Fed.R.Evid. Rule 804(b)(5), and the error not harmless. See also United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977), wherein the defendant Gonzalez, although immunized, refused to testify at his trial, and wherein the District Court

admitted into evidence portions of the transcript of the grand jury testimony of a previously convicted coconspirator (Guerrero). However, the trial court determined that in view of the pressures put upon Guerrero by the prosecutor and the grand jury to give the grand jury testimony, it was apparently in Guerrero's own best interest to testify before the grand jury, and after careful consideration, Guerrero thought that it would be better for him to give the grand jury testimony, and accordingly did so. Id. at 1273. The Court of Appeals thus concluded that the District Court's decision to admit the grand jury testimony was reversible error, as that testimony was not admissible under Fed.R.Evid. Rule 804(b)(5). Id. at 1274. According to the appellate court, the proffered testimony lacked sufficient indicia of trustworthiness. Id.

Additionally, see United States v. Rodriguez, 706 F.2d 31, 40 (2d Cir. 1983) (exclusion of hearsay investigative report upheld on appeal; report not sufficiently corroborated, hence not admissible under Rule 804(b)(5)). See also In re Corrugated Container Antitrust Litigation, 75; F.2d 411, 414-415 (5th Cir. 1985) (transcript of government interview given under grant of use immunity and without confrontation or cross-examination not sufficiently trustworthy to qualify for admission under Rule 804(b)(5)). And see United States v. Tovar, 687 F.2d 1210, 1213 (8th Cir. 1982) (defendant's hearsay statements, though given against the declarant's penal interest, were not "corroborated by circumstances indicating their trustworthiness", hence not admissible under either Rule 804(b)(3) or Rule 804(b)(5).

Adverting now to the case at bar, one salient aspect of this case is that Kathleen Anne Snyder did not have any grant of immunity at the time that she testified before the grand jury. And since, by her own admission, she was involved in the opertions of Marchini Construction Company, Inc. and the handling of its accounts receivable, accounts payable, and payroll (RT 22-23 (7/17/84)), she was unavoidably in a position where she had a natural incentive to tend to exculpate herself and to incriminate Albert Marchini. And some of her grand jury testimony that was admitted at the trial appears to bespeak a conscious effort on her part to deflect the eye of official suspicion from herself to Mr. Marchini. See, for example, her grand jury testimony at RT 25:7-26:12; RT 33:10-12; RT 34:4-19; RT 36:7-16; and RT 45:25-46:12 (7/17/84). More-

over, a large portion of Ms. Snyder's grand jury testimony is to the effect that she blindly took orders from her boss, Albert Marchini, and did not ask questions of him. But in accordance with that situation, Kathleen Snyder's grand jury testimony betrays a conspicuous lack of personal knowledge on her part. Such is evident, for example, at RT 43:17-21; RT 45:6-24; RT 46:1-12; and RT 61, 66, and 71 (7/17/84). Moreover, some of Kathleen Snyder's grand jury testimony shows a considerable loss of memory on her part, in regard to the operations of Marchini Construction. See, e.g., RT 47; RT 53; and RT 65 (7/17/84). Thus it is apparent that the grand jury testimony of Kathleen Snyder was lacking in those indicia of trustworthiness necessary for the statement to qualify for admission into evidence under Rule 804(b)(5). Furthermore, despite the contrary

statement in the Opinion of the Ninth Circuit below, it is respectfully submitted that an examination of the grand jury testimony of Kathleen Snyder that was actually admitted into evidence shows that the testimony of Ms. Snyder was not substantially corroborated by other testimony and/or evidence in this case.

The Ninth Circuit stated its holding on the issue under Fed.R.Evid. Rule 804(b)(5) at page 10, lines 11-16. The language of the Ninth Circuit's Opinion reflects the fact that the question in regard to the admissibility of the grand jury testimony addressed by the appellate panel herein was a matter of first impression with the Court of Appeals. Moreover, the appellate panel acknowledged, at lines 5-6 of page 5 of its Opinion, that the circuits differ as to the particular circumstances under which

grand jury testimony may be admitted under Fed.R.Evid. Rule 804(b)(5).

Furthermore, a salient aspect of the matter of the admissibility of grand jury testimony addressed by the Court of Appeals in this case is that it bears upon the constitutional matter of the application of the Confrontation Clause of the Sixth Amendment to criminal trial proceedings, for as is well-known, there is allowed neither cross-examination nor the appearance of counsel for a witness, nor any semblance of adversarial proceedings, in a grand jury room.

Significantly, the Court of Appeals, at page 9 of its Opinion, quoted language from United States v. Barlow, 693 F.2d 954, 964 (6th Cir. 1982), wherein the Sixth Circuit articulated the salutary function of the Confrontation Clause. Specifically, at lines 17-23 of page 9 of its Opinion in this appeal, the Ninth

Circuit, quoting language of the Court in Barlow, noted:

> ". . . The court observed that the purpose of the Confrontation Clause is to '"advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that the 'trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'"' Id. (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)(quoting California v. Green, 399 U.S. 149, 161 (1970) (brackets by the Court))."

Furthermore, as stated by the Court of Appeals in Barlow, Rule 804(b)(5) is not a "firmly rooted hearsay exception", and accordingly, under the analysis prescribed in Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed. 597 (1980), the Confrontation Clause mandates that any hearsay statement of an unavailable witness which is sought to be admitted under Rule 804(b)(5) must be attended by "particularized guarantees of trustworthiness".

The appellate panel in its Opinion in

the present appeal maintains that the Court of Appeals in Barlow upheld the admission of grand jury testimony at trial on facts the same as those of the case at bar, except that in Barlow, the witness had been granted immunity at the grand jury hearing. However, it is submitted that there is yet another significant difference between the circumstances in Barlow and those in the case at bar, so that the Barlow case is in fact not apposite to support the holding of the Ninth Circuit hereinbelow. For in Barlow, as noted by the Court therein at 693 F.2d 962, "the testimony was offered for a limited purpose, to establish that the defendant was not with his girl friend when he claimed", so that "[b]y itself the testimony did not relate evidence of criminal activity". In the instant case, however, Kathleen Snyder testified that to her knowledge, a large amount of cash was

raised by Marchini Construction Company through the cashing of checks, and that at least some of that money was paid to employees, although (as far as she was aware) no record of the cash payments to employees was kept. RT 42-46 (7/17/86). And of course, failure to keep a record of cash wages paid to employees is a violation of law. Clearly, the grand jury testimony of Kathleen Snyder, unlike that of Iantha Humphries in Barlow, related "evidence of criminal activity", and thus a higher degree of corroboration is required in the case at bar than was required in Barlow. Id. at 962.

Moreover, it would seem that the fact that Kathleen Snyder was advised by counsel in regard to her grand jury appearance (see Opinion, page 7, lines 20-21) was not a factor enhancing the reliability of her testimony. And in fact, it may well be

supposed that Kathleen Snyder was provided further, not less, impetus to seek to exculpate herself, and hence to implicate Mr. Marchini, in her grand jury testimony, by the fact that she was advised by counsel in connection with her grand jury appearance, since any such counsel was presumably her counsel, and not counsel representing the interests of Albert Marchini. And it is not surprising that Kathleen Snyder chose to have counsel advising her in regard to her grand jury appearance, for she was herself implicated to some degree, as an involved employee, in the activities of Marchini Construction Company which were under investigation, and her interests in regard to this case unquestionably conflicted with those of Mr. Marchini.

Significantly, Judge Quackenbush of the District Court below remarked, at RT 4:4-9 (7/17/84):

> "Clearly, the witness was under oath; clearly, there was an attorney there on her behalf which, of course, doesn't remedy the very critical concern that I have and the Courts have of the fact that counsel was not there on behalf of Mr. Marchini and with the opportunity to confront or cross-examine the witness. . . ." (Emphasis supplied.)

As a result, it is submitted, the grand jury testimony of Kathleen Snyder was not attended by sufficient indicia of reliability to warrant its admission at Mr. Marchini's trial, so that review by the Supreme Court of the Opinion in the appeal in this case, at least insofar as it relates to the constitutional issue of the admissibility of grand jury testimony under the circumstances of this case, is appropriate. The Court of Appeals' assertion that the grand jury testimony of Kathleen Snyder was at the same time "cumulative" and "unique" (Opinion, page 8, lines 11 through 12) is, with all due respect,

cryptic indeed. It is submitted that Mr. George Neil Alexander was also a bookkeeper for Marchini Construction Company, and that the record does not indicate that Kathleen Snyder's grand jury testimony was unique. The judgment of the Court of Appeals, it is submitted, should be reversed.

II. IT WAS PREJUDICIAL AND REVERSIBLE ERROR FOR THE DISTRICT COURT TO ADMIT THE TRIAL TESTIMONY OF RUSSELL W. OLSEN, OFFERED AS THE TESTIMONY OF THE GOVERNMENT'S "EXPERT SUMMARY WITNESS" IN THIS CASE; MR. OLSEN, FROM THE WITNESS STAND, RELATED HIS SUPPOSEDLY "EXPERT" INTERPRETATION OF THE TESTIMONY OF PREVIOUS GOVERNMENT WITNESSES IN THIS CASE, AND THUS USURPED THE FACTFINDING FUNCTION OF THE JURY.

A. Standard of Review

In regard to the proper standard of appellate review applicable to review of a claim of possible usurpation of the function of the jury by the presentation of the testimony of Russell W. Olsen as a "sum-

mary" witness, and the introduction of Government's Trial Exhibit 57, the apellant's counsel, after a careful review of the case law, believes that the error claimed is of constitutional dimension, and that, by analogy with situations of improper vouching by a prosecutor, the proper standard should be that enunciated by the Court of Appeals for the Ninth Circuit in United States v. West, 580 F.2d 652, 656-657 (9th Cir. 1982), according to which the reviewing court may affirm only if it is more probable than not that the error did not materially affect the verdict.

B. Analysis

During his testimony, Mr. Russell Olsen testified concerning his estimate of the amount of taxes that he maintained should have been withheld and paid over to the Internal Revenue Service. See RT 136-138

(7/17/84). According to Mr. Olsen's testimony, in making these estimates, he was working on the assumption that for each period in question, employees of Marchini Construction Company, Inc. were uniformly paid their wages in the form of 50% as a check, and 50% in cash. Accordingly, Mr. Olsen, in his determination of the amount of wages actually paid by Marchini Construction Company, simply used the amounts of the wages paid in the form of payroll checks, as recorded in the Marchini Construction Company payroll ledgers for the respective periods in question, and doubled those recorded wage figures. (See RT 83-84 (7/17/84) (testimony of Slavko Lukich re payroll ledgers).) At RT 137:13-15 (7/17/84), Mr. Olsen stated his conclusion that "in most instances" he found that the percentage of omission of withholding taxes ranged "from approximately 62 to 72 per-

cent". Yet on cross-examination, Mr. Olsen acknowledged that, in making his calculations and estimates and in giving his own testimony, he had discounted the earlier testimony of Neil Alexander, Katherine Anne Snyder, and Jeffrey Goodale, wherein they had testified that the wages of Marchini Construction Company were not always paid in the form of 50% check and 50% cash. RT 145:6-147:12. The giving of testimony by Mr. Olsen as to his calculations and estimates based upon such discounting of earlier witness testimony was prejudicial to the defendant Albert Marchini, since certain testimony clearly stated that at certain times and in certain instances, wages of Marchini Construction Company were paid entirely by check. See, for example, the testimony of Neil Alexander, the Marchini Construction Company bookkeeper, at RT 108:17-21 and RT 131:23-132:4 (7/16/

84). And Mr. Jeffrey Goodale, who was a carpenter employed by Marchini Construction Company, testified that approximately half the time he received his pay entirely in the form of a check from Marchini Construction, while at the other times, he received no more than one-half of his pay in cash from that company. His testimony is at RT 286, et seq. (7/17/84). See, in particular, RT 286-287 (7/17/84).

At RT 156-157 (7/17/84), defense counsel Michael T. Kenney objected in open court to the testimony of Mr. Olsen, and further objected to the admission into evidence of Government's Trial Exhibit 57, a summary prepared by Mr. Olsen for use in his testimony as a "summary witness". Mr. Kenney's objection was based upon the usurpation of the function of the jury as factfinder, by the presentation of Mr. Olsen's "digest", as it were, of the data

presented by earlier witnesses and exhibits, wherein Mr. Olsen weighed in his own mind the relative merits and credibility of different parts of the earlier testimonial presentations and exhibits. See, for example, RT 145:20-146:14 (7/17/84). In effect, Mr. Olsen was holding himself out to the jury as an omniscient witness who was undertaking to weigh the various components of the earlier witnesses' testimony, and on that basis, to advise the jury in conclusory fashion how to return their verdict in this case. The presentation of such "summary" testimony by Mr. Olsen effectively and inevitably had the effect of "short-circuiting" jury deliberations, and deprived Mr. Marchini of his constitutional right to be tried by a jury of his peers.

It was prejudicial error on the part of the trial court to deny the motion of

defense counsel Michael T. Kenney based upon the unfair and damaging testimony of Mr. Olsen. The ruling of the Court of Appeals upholding the admission of the testimony of Russell Olsen should be vacated.

III. THE GIVING OF THE ALLEN JURY INSTRUCTION BY THE DISTRICT COURT WAS PREMATURE, AND COERCIVE, AND CONSTITUTED PLAIN ERROR.

A. Standard of Review

The applicable standard of review is whether the District Court committed plain error. "Plain error" is error affecting substantial rights of one or more of the parties. Fed.R.Crim.P. Rule 52(b).

B. Analysis

The objections of the appellant to the District Court's Allen instruction, given at RT 342-347 (7/18/84), is threefold: (1) it impermissibly emphasized that the trial

had been "expensive in time and effort and in money"; (2) it was given prematurely, after only approximately four hours and 40 minutes of deliberations (RT 339:8-11); and (3) the instruction was unduly lengthy and, by virtue of the trial court's perceived authority in the eyes of the jury, impermissibly coercive.

That portion of the Allen instruction wherein the trial judge gives admonition to the jury in regard to the cost of the trial is at RT 342:21-343:3 (7/18/84), and reads as follows:

> "This is an important case. The trial has been expensive in time and effort and in money, both to the defense and to the prosecution. If you should fail to agree on verdicts, the case is left open and undecided. Like all cases, this case must be disposed of sometime. There appears to me to be no reason to believe that another trial would not be just as costly to both sides as this trial has been."

In United States v. Mason, 658 F.2d

at 1263 (9th Cir. 1981), the Court of Appeals, speaking at 1267, declared:

> "The court has long recognized that injection of fiscal concerns into jury deliberations has potential for abuse. In Peterson v. United States, 213 F.2d 920 (9th Cir. 1914), this court criticized a charge which began with statements regarding the expense of the trial and then stated that '[t]he government has a right without farther [sic] expenditure of time and money . . . and if [the defendants] are innocent they have a right to be acquitted before their means are exhausted.' Id. at 924. . . ."

As noted further in Mason, supra, such language was criticized because not counterbalanced with emphasis that the jurors must not reach a verdict in violation of any of their honest convictions. Id. at 1267. While, in the instant case, some effort was made by the trial judge to so apprise the jurors, it is respectfully submitted that the fact that the Allen instruction was given so early in the

deliberations had the effect of compounding the coercive tendency of the instruction. Moreover, it is submitted that the Allen instruction, in conjunction with the conclusory testimony of the prosecution's "expert summary witness" Russell W. Olsen, was calculated to, and did, impermissibly curtail the jury's deliberations, and that the Allen instruction constituted reversible error.

CONCLUSION

To allow this Court's review and

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supervision of this case, the present Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DATED: November 11, 1986

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A P P E N D I X A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	FILED AUG 18, 1986 CATHY A. CATTERSON, CLERK, U.S. COURT OF APPEALS
Plaintiff/Appellee,	)	
v.	)	No. 84-1279
ALBERT MARCHINI,	)	D.C. No.CR-LV-84-15-01-JLQ
Defendant/Appellant.	)	OPINION

On appeal from the United States District Court
for the District of Nevada
Honorable Justin L. Quackenbush,
District Judge, Presiding

Argued and Submitted -- April 16, 1986
San Francisco, California

Before: WALLACE, FARRIS, and BOOCHEVER, Circuit Judges.

BOOCHEVER, Circuit Judge:

Albert Marchini appeals his conviction on fifteen counts of violating 26 U.S.C. § 7206 (1) (1982), which proscribes the willful making and subscribing of any tax return, statement, or other document which

the maker does not believe to be true and correct. Marchini raises the following issues on appeal: (1) Did the district court (a) abuse its discretion or (b) violate appellant's right to confrontation by admitting under Fed. R. Evid. 804(b)(5) grand jury testimony of the appellant's wife after she invoked her spousal and marital privileges not to testify against her husband? (2) Did a guilty verdict on count XIII violate the Due Process Clause of the Fifth Amendment in light of an arguably inconsistent verdict of acquittal on count I? (3) Did the district court abuse its discretion by admitting the testimony and summary exhibit of the government's "expert summary witness"? (4) Was the jury's finding of sufficient evidence to establish that appellant willfully and knowingly failed to report cash wages

clearly erroneous? (5) In light of appellant's failure to object, was it plain error for the district court to give an Allen instruction? (6) Has appellant established that the district court abused its discretion by denying four pretrial motions? We address these issues seriatum, and affirm.

FACTS

Albert Marchini was the owner and operator of Marchini Construction Company, Inc., a Las Vegas, Nevada corporation, from 1968 to late 1980. Marchini employed between 100 and 300 construction employees at any given time, a bookkeeper, and a general office secretary/payroll clerk (Kathleen Anne Snyder, who married Marchini in 1983). He admits that he regularly paid his employees' weekly wages partially by check and partially by cash. He also admits that he did not report the

cash wages on his Employer's Quarterly Federal Tax Return Form 941 or on his Employer's Annual Federal Unemployment Tax Return Form 940. His defense is that he believed it was the responsibility of the employees to report wages paid by cash. He did not report the cash wages he paid to himself, however.

After a prolonged investigation by the Justice Department and a grand jury hearing, the grand jury charged Marchini with twelve counts (I-XII) of willfully and knowingly making and subscribing a United States Employer's Quarterly Federal Tax Return Form 941, substantially underreporting total wages subject to withholding. Each count corresponded to a calendar year quarter beginning with the fourth quarter of 1977 and continuing through the third quarter of 1980. He was also charged with four counts (XIII-XVI)

of willfully and knowingly making and subscribing a United States Employer's Annual Federal Unemployment Tax Return Form 940, substantially underreporting total taxable wages. Each count corresponded to a calendar year, 1977 through 1980. All sixteen counts charged him with violation of 26 U.S.C. § 7206(1). The total amount alleged to have been underreported was between one and one-and-one-half million dollars.

Marchini was tried by jury on July 16-19, 1984. He was found not guilty on count I and guilty on all remaining fifteen counts. He was sentenced to two years imprisonment on count II, with imprisonment suspended on counts III-XVI, and a special five year probationary period was imposed to begin after his release from prison.

ANALYSIS

I. Grand Jury Testimony

At the grand jury proceedings conducted June 22, 1982, Marchini's secretary, Kathleen Snyder, testified concerning her duties and various office and payroll procedures of Marchini Construction Company. She subsequently married Marchini in February 1983. During Marchini's July 1984 trial, she was called as a witness by the prosecution, and she invoked her spousal and marital privileges not to testify against her husband.

The district court held a hearing to determine whether her grand jury testimony could be admitted under Fed. R. Evid. 804 (b) (5), and without violating Marchini's confrontation rights. The district court ruled that she was "unavailable" as a witness within the meaning of Rule 804. The court set forth its detailed analysis

and ruled that her testimony was admissible under Rule 804(b) (5). Further, the court ruled that no confrontation violation resulted. Portions of her testimony were read to the jury. Marchini argues that the admission of her grand jury testimony was both an abuse of discretion under Rule 804(b) (5) and a violation of his right to confront witnesses against him.

A. Fed. R. Evid. 804(b) (5)

"The district court's decision to admit evidence is reviewed for an abuse of discretion." United States v. Winn, 767 F.2d 527, 529 (9th Cir. 1985). Rule 804(b) (5) provides for the admission of statements which otherwise would be hearsay if they have circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions and if the trial court determines (A) the statement

is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be served by admission of the statement into evidence.

The admissibility of grand jury testimony under this exception has not been addressed by this circuit, but it has been the subject of a number of opinions in other circuits. There appears to be general agreement that such testimony can be admitted under Rule 804(b) (5) in proper circumstances, but the circuits differ as to the precise terms of this admission. Garner v. United States, 439 U.S. 936, 939 (Stewart, J., dissenting from denial of cert. to 574 F.2d 1141 (4th

Cir. 1978)); United States v. Barlow, 693 F.2d 954, 960-63 (6th Cir. 1982) (discussing cases), cert. denied, 461 U.S. 945 (1983); see, e.g., United States v. Boulahanis, 677 F.2d 586 (7th Cir.), cert. denied, 459 U.S. 1016 (1982); United States v. West, 574 F.2d 1131 (4th Cir. 1978); United States v. Garner, 574 F.2d 1141 (4th Cir.), cert. denied, 439 U.S. 936 (1978); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977); cf. United States v. Thevis, 665 F.2d 616 (5th Cir.) (avoiding need to determine whether grand jury testimony ever meets reliability standards of Rule 804(b) (5) because testimony admissible on waiver grounds), cert. denied, 456 U.S. 1008 (1982); United States v. Gonzales, 559 F.2d 1271 (5th Cir. 1977) (grand jury testimony inadmissible under Rule 804(b) (5) because

it lacked "equivalent guarantees of trustworthiness" under the facts of case, distinguishing United States v. Carlson).

In United States v. Barlow, the Sixth Circuit was presented with a situation strikingly similar to this case. There the court ruled that the admission of the grand jury testimony of defendant's friend was permissible under rule 804(b)(5), notwithstanding her subsequent marriage to defendant prior to trial and her assertion of her marital privileges. 693 F.2d at 963. The court extensively analyzed the cases from other circuits, and established the following approach, which we adopt.

First, the district court must ascertain whether the witness is "unavailable" within the meaning of the rule. The court held that the assertion of a marital privilege where the marriage was not a sham rendered the witness unavailable.

693 F.2d at 961-62.

Second, the trial court must determine whether the substance of the grand jury testimony possesses "circumstantial guarantees of trustworthiness" equivalent to other exceptions included in Rule 804.

> In making this determination the trial court should consider the declarant's relationship with both the defendant and the government, the declarant's motivation to testify before the grand jury, the extent to which the testimony reflects the declarant's personal knowledge, whether the declarant has ever recanted the testimony, and the existence of corroborating evidence available for cross-examination.

Id. at 962.

"Finally, other factors which have no direct bearing on 'circumstantial guarantees of trustworthiness' may be considered to determine whether the 'purposes of [the rules of evidence] and the interests of justice will best be served' by the admission of grand jury

testimony." Id. (quoting Fed. R. Evid. 804(b) (5) (C)) (brackets by the court). For example, the court considered as an appropriate factor the defendant's role in marrying the witness and thus making her unavailable, even though the marriage was bona fide. Id.

Another factor to be considered is the subject matter of the evidence. If the testimony is direct evidence of guilt or critical proof of guilt, other factors, such as corroboration, must weigh heavily in favor of admissibility. On the other hand, if the evidence goes to a collateral matter or is circumstantial or cumulative evidence the other factors need not be as strong. Id. at 962-63.

After ruling that the witness was unavailable, the district court in this case specifically found that the grand jury testimony possessed clear indicia of

trustworthiness. The court found that "[a]ll of her testimony is confirmed by every witness who has testified in this case, including the banker." Further, her testimony was corroborated by the testimony of her husband, appellant herein. The court recited the following factors to support its decision: there was no indicium of an attempt to inculpate Marchini, no motive was shown for her to distort the truth and falsely inculpate him, and if anything, her testimony reflected efforts to exculpate him; the witness was under oath and represented by counsel; her testimony related strictly to facts within her observation and personal knowledge; she never recanted her testimony; and finally, her marriage to Marchini was the reason that the witness was unavailable, though the court stressed that this factor did not carry much

weight. We approve of the district court's analysis and hold that it did not abuse its discretion.

Marchini also argues that Rule 804(b)(5)'s other requirements are not met. He contends that Kathleen Snyder's testimony was not more probative on any point for which it was offered than any other evidence which the government could have procured with reasonable efforts. The government asserts that because she was the only bookkeeper for Marchini Construction Company, and because she cashed several of the spurious supplier checks at Marchini's request, there was no better evidence concerning certain office procedures. Although the importance of the substance of her testimony was cumulative, we agree that her testimony was unique as she was the only person that could establish the link between the

drafting of the supplier checks and their conversion to cash which demonstrated Marchini's guilt.

We therefore hold that the district court properly considered all relevant factors in concluding that the grand jury testimony possessed sufficient guarantees of trustworthiness, and did not abuse its discretion in admitting that testimony.

B. Confrontation Clause

Marchini also maintains that the admission of the grand jury testimony violated his Sixth Amendment right to be confronted with the witnesses against him.

In Ohio v. Roberts, 448 U.S. 56 (1980), the Supreme Court permitted the admission of a transcript of a witness' preliminary hearing testimony at the defendant's trial where the witness was unavailable. The Court set forth a two-part analysis. First, the Confrontation Clause requires

that the hearsay declarant be unavailable. Second, the statements must possess "adequate 'indicia of reliability.'" 448 U.S. at 66. "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." Id.

In Barlow, the Sixth Circuit held that because Rule 804(b) (5) is not a "firmly rooted hearsay exception," reliability may not be inferred merely on the basis that evidence falls within the Rule. 693 F.2d at 964 (footnote omitted). We agree. We also agree that the Sixth Circuit was correct in refusing to equate the "circumstantial guarantees of trustworthiness" required by Rule 804(b) (5) with "particularized guarantees of trustworthiness"

mandated by Roberts, instead adopting a case-by-case analysis. Id. The court observed that the purpose of the Confrontation Clause is to "'advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that the "trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement."'" Id. (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970) (quoting California v. Green, 399 U.S. 149, 161 (1970) (brackets by the Court)).

The court held that the admission of the grand jury testimony under the facts of Barlow did not violate the defendant's right to confrontation. The statements of the witness were of past fact, within her personal knowlege, and were corroborated by other evidence at trial. Barlow, 693 F.2d at 965. This is exactly the case

here. The only difference is that in Barlow, the witness had been granted immunity at the grand jury hearing. The district court in this case found that there was no indication of a motive or attempt to inculpate Marchini. Nor did the witness seek immunity. We also observe that in asserting the marital privilege the witness was acting in cooperation with Marchini. It was Marchini's defense counsel that discussed the privilege with Mrs. Marchini and represented to the court that she would invoke her privilege.

We hold that in cases where a witness-spouse is unavailable due to the invocation of a bona fide marital privilege, the introduction of that witness' grand jury testimony in the defendant-spouse's trial does not violate the Confrontation Clause provided there are adequate indicia of

reliability characterized by particularized guarantees of trustworthiness. We hold that such is the case before us, and that Marchini's Sixth Amendment rights were not violated by the introduction of the grand jury testimony of Kathleen Snyder. We emphasize, however, that our holding today is a narrow one, and is not to be construed to permit the introduction of all grand jury testimony whenever the witness is unavailable.

II. Due Process

Marchini contends that because he was found not guilty on count I (willfully and knowingly making false employer's quarterly tax return for fourth quarter of 1977) and guilty on count XIII (willfully and knowingly making false employer's annual unemployment tax return for calendar year 1977), these two verdicts are inconsistent, devoid of any rational

basis, and therefore violative of his right to due process. Marchini relies on United States v. Duz-Mor Diagnostic Laboratory, Inc., 650 F.2d 223 (9th Cir. 1981), and other coconspirator cases for the proposition that inconsistent verdicts must be supported by a rational basis.

As a general rule, inconsistent verdicts may stand, even when a conviction is rationally incompatible with an acquittal, provided there is sufficient evidence to support the guilty verdict. United States v. Birges, 723 F.2d 666, 673 (9th Cir.), cert. denied, 466 U.S. 943 (1984). Duz-Mor is inapposite because it sets forth a limited exception to the general rule. Duz-Mor held that a conviction of one defendant and acquittal of the other when the only evidence of culpability applies equally to both may violate due process unless there is an articula-

tion of a rational basis for dissimilar treatment. 650 F.2d at 225-27.

The government argues that the jury could have believed that Marchini did not willfully and knowingly make a false tax return as to the last quarter because Marchini believed that the general contractor for a Hawaiian project was responsible for making the reports. The jury could have believed Marchini made knowing false reports during other portions of the year, however, because evidence was introduced to show that cash wages had been paid but not reported during 1977. We hold that substantial evidence supports the jury's verdict on count XIII.

III. Expert Summary Witness

The court permitted IRS Agent Olsen to testify as an "expert summary witness" based upon his having heard the testimony

of previous witnesses and having reviewed the government's exhibits. The court also admitted the government's summary exhibit prepared by Agent Olsen and used during Olsen's testimony. Olsen testified that it was his conclusion that Marchini had omitted wages from Forms 941 and 940 during the time periods involved in the case. He explained that his calculations of the amount of wages underreported were based upon his doubling the amounts of payroll that Marchini paid by check, thus assuming that Marchini paid fifty percent of his wages by check and fifty percent by cash.

Marchini contends that Olsen's testimony usurped the fact-finding function of the jury, and that his testimony and the admission of the summary exhibit constitute constitutional error requiring reversal.

We review the district court's admission of summary exhibits and testimony of expert witnesses for an abuse of discretion. United States v. Harenberg, 732 F.2d 1507, 1513-14 (10th Cir. 1984). In Harenberg, the Tenth Circuit approved the use of summary witness testimony where the IRS agent testified that his summary was based upon the evidence adduced at trial, he was subjected to a thorough voir-dire on the summary before it was introduced, and thoroughly cross-examined about his testimony after it was admitted. Id. at 1514. Accord United States v. Genser, 582 F.2d 292, 298-99 (3d Cir. 1978); United States v. Schafer, 580 F.2d 774, 778 (5th Cir.), cert. denied, 439 U.S. 970 (1978).

In this case, Agent Olsen was qualified as an expert. His calculations were based upon the evidence adduced at trial. He was cross-examined by the defendant as to

the basis of his testimony. Marchini testified at his trial that it was a "fair assumption" that his standard payroll procedure was to pay fifty percent by check and fifty percent by cash. For these reasons, we hold that the district court did not abuse its discretion in admitting the summary testimony of the government's expert witness and his summary chart to assist the jury in understanding this tax case.

IV. Motion for Acquittal for Insufficient Evidence

Marchini next contends that the district court erred in failing to grant his motion for acquittal brought at the close of the government's case in chief, based on insufficient evidence to support a jury verdict of willful and knowing underreporting of income.

The test for sufficiency of the

evidence is whether "after viewing the evidence in the light most favorable to the prosecution, **any** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); United States v. Marabelles, 724 F.2d 1374, 1377 (9th Cir. 1984). "The findings of the trier of fact will not be set aside unless clearly erroneous." United States v. Anderson, 642 F.2d 281, 285 (9th Cir. 1981).

Willfulness in filing a false tax return under section 7206(1) requires a showing of specific wrongful intent to avoid a known legal duty. Marabelles, 724 F.2d at 1379. Willfulness may be inferred from all the facts and circumstances of a defendant's conduct. Id. For example, willfulness may be inferred from

a consistent pattern of underreporting of large amounts of income, United States v. Gardner, 611 F.2d 770, 776 (9th Cir. 1980), from the use of false names and surreptitious reliance upon cash, United States v. Holladay, 566 F.2d 1018, 1020 (5th Cir.), cert. denied, 439 U.S. 831 (1978), and from the defendant's attitude toward the reporting and payment of taxes generally, United States v. O'Connor, 433 F.2d 752, 754 (1st Cir. 1970), cert. denied, 401 U.S. 911 (1971).

The evidence adduced showed that Marchini made a statement to his acountant that he did not want to file with the IRS and would not file if he could get away with it. The evidence showed and Marchini admitted that he created and cashed spurious supplier checks from 1977 to 1980, forged the first endorsement, and had a member of his office cash the check at a

friendly bank. He then used this cash along with payroll checks to pay wages, and he did not report the cash wages paid to his employees or to himself. From this evidence, the jury could reasonably have inferred Marchini willfully underreported cash wages. We hold that the district court did not err in denying Marchini's motion for acquittal.

V. The Allen Instruction

After the jurors had deliberated for approximately four hours and forty minutes, they sent a note to the judge indicating that they were deadlocked after taking four written ballots. Without objection by either party, indeed, having incorporated a modification in the proposed instruction at Marchini's request, the judge gave a so-called "Allen" instruction which encouraged the members of the jury to reconsider their positions and the

evidence with proper deference to the opinions of the majority. The court emphasized that jurors should not, however, surrender their honest convictions simply because other jurors differed. The court prefaced its instruction with a comment that the trial "has been expensive in time and effort and in money" to both parties, and there was no reason to believe that another trial would produce any better evidence, or that another jury would be any more competent or conscientious in making a decision.

For the first time on appeal, Marchini objects that the giving of this instruction was premature,coercive, too lengthy, and plainly erroneous. Where a defendant does not object to an instruction, he must establish that the instruction constituted plain error in order to obtain a reversal of a jury verdict. United States v.

Bagby, 451 F.2d 920, 927 (9th Cir. 1971); Fed. R. Crim. P. 52(b). While we have "long recognized that injection of fiscal concerns into jury deliberations has potential for abuse," United States v. Mason, 658 F.2d 1263, 1267 (9th Cir. 1981)(citing Peterson v. United States, 213 F. 920 (9th Cir. 1914)), we have upheld this type of Allen instruction. United States v. Seawell, 583 F.2d 416, 417-18 (9th Cir.) (virtually identical Allen instruction, footnote 2; citing cases, footnote 3), cert. denied, 439 U.S. 991 (1978); see also United States v. Arbelaez, 719 F.2d 1453, 1461 (9th Cir. 1983) (upholding Allen charge), cert. denied, 467 U.S. 1255 (1984). While a more difficult question would have been raised had an objection been made, we hold that the instruction did not constitute plain error.

VI. Pretrial Motions

Finally, Marchini contends that the district court erred by denying four pretrial motions. He makes no specific assignment of error, but instead "directs this Court to the points and authorities incorporated within each of the motions in question. See, in particular, EOR 26-169, of the Excerpt of Record. The briefing incorporated therein . . . demonstrates that the District Court erred in its denials of the requests therein." Rule 13(i) of the Rules of the United States Court of Appeals for the Ninth Circuit provides in part that "[p]arties may not avoid the page limitations of Rule 28(g) of the Federal Rules of Appellate Procedure or the requirements of this rule by incorporating by reference memoranda submitted to the district court . . . from which the appeal is taken." We find that

Marchini's pretrial motions arguments violate this rule, and thus will not be considered.

CONCLUSION

For the reasons given in this opinion, Marchini's conviction on all counts is

AFFIRMED.

A P P E N D I X B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff/Appellee, v. ALBERT MARCHINI, Defendant/Appellant.	)	No. 84-1279 FILED SEP 22, 1986 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS ORDER

Before: WALLACE, FARRIS, and BOOCHEVER, Circuit Judges.

The petition for rehearing is DENIED.

A P P E N D I X C

UNITED STATES CONSTITUTION

AMENDMENT VI--JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

No. 86-808

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALBERT MARCHINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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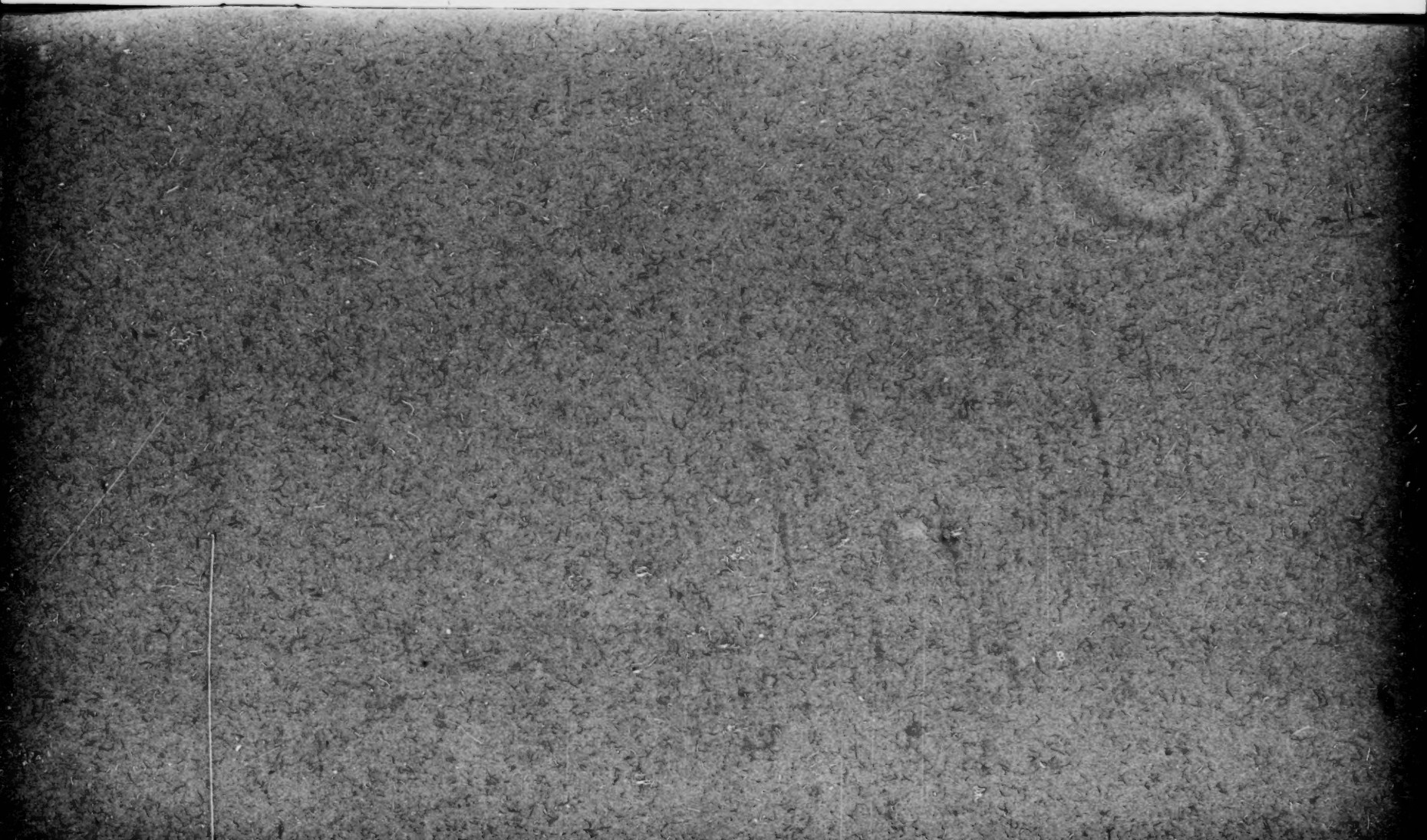

QUESTIONS PRESENTED

1. Whether the admission at petitioner's criminal trial of his wife's grand jury testimony under Rule 804(b)(5) of the Federal Rules of Evidence was improper under the Rules or under the Confrontation Clause of the Sixth Amendment.

2. Whether the district court abused its discretion by admitting a summary exhibit and the testimony of the government's "expert summary witness."

3. Whether the district court committed plain error in delivering an "*Allen*" charge.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A31) is reported at 797 F.2d 759.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1986. A petition for rehearing was denied on September 22, 1986 (Pet. App. B1). The petition for a writ of certiorari was filed on November 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioner was convicted on 15 counts of willfully filing false employer's tax returns, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to a two-year term of imprisonment on Count Two. On the remaining counts, petitioner was placed on probation for a period of five years, to follow the term of imprisonment imposed on Count Two. The court of appeals affirmed (Pet. App. A1-A31).

1. The evidence at trial established that between 1968 and late 1980 petitioner was the owner and operator of Marchini Construction Company, Inc., located in Las Vegas, Nevada. Marchini Construction employed a bookkeeper, a general office secretary/payroll clerk, and between 100 and 300 construction employees at any given time. The secretary/payroll clerk, Kathleen Anne Snyder, married petitioner in 1983. Pet. App. A3. Petitioner admitted at trial that sometime before 1977 his company began paying its employees' weekly wages partially by check and partially by cash (7/18/84 Tr. 183-184). The company paid its supervisory and office staff in a similar manner even though they did not demand cash payments (*id.* at 221, 222).

In order to generate cash for those wage payments, petitioner made out checks to fictitious suppliers, forged the endorsements of fictitious persons, signed the checks as a second endorser, and then cashed the checks (7/17/84 Tr. 268-269; 7/18/84 Tr. 223). Petitioner admitted that he did not report the cash wages on his company's Employer's Quarterly Federal Tax Return Form 941 or on his company's Employer's Annual Federal Unemployment Tax Return Form 940 during the periods alleged in the indictment (Pet. App. A3-A4). His defense was that he believed it was the responsibility of his employees to report wages paid to them in cash; petitioner, however, did not report the cash wages that the company paid to him (*id.* at A4).

In addition, petitioner's accountant testified that petitioner had stated on several occasions in 1976 that he did not want to file the Forms 941 and that he would not file them if he could get away with it (7/16/84 Tr. 156-160). The company's general superintendent also testified that in 1980 he had discussed with petitioner the company's failure to report cash wages paid to employees. Petitioner

had stated at that time that he "would probably be in trouble with the IRS" and he would have to "pay for it later" (*id.* at 173-174, 195).

2. On appeal, petitioner claimed that the district court had erred by admitting Kathleen Snyder's grand jury testimony. Before her marriage to petitioner, Snyder had testified before the grand jury, describing her duties as the secretary/payroll clerk for petitioner's business, describing its office procedures, and admitting that she had cashed several false supplier checks at petitioner's request (7/17/84 Tr. 20-73). At trial, however, she had invoked the marital privilege and was therefore "unavailable" to testify within the meaning of the hearsay rules. The district court had admitted her testimony under Fed. R. Evid. 804(b)(5), the "catch-all" exception for unavailable declarants, and had rejected a contention that admission of the testimony would violate petitioner's rights under the Confrontation Clause. The court of appeals agreed. Pet. App. A6-A19.

The court of appeals noted that the circuits are in general agreement that grand jury testimony can be admitted under Rule 804(b)(5), and it adopted the analytical approach of the Sixth Circuit as set forth in *United States* v. *Barlow,* 693 F.2d 954, 961-962 (1982), cert. denied, 461 U.S. 945 (1983). In upholding the admission of the testimony, the court pointed to the detailed factual findings of the district court that Snyder's testimony was "confirmed by every witness who has testified in this case, including the banker" (7/17/84 Tr. 3, 11, 15-17); that her testimony was corroborated by other evidence, including the testimony of her husband; that Snyder was under oath and had no motive to falsify her testimony; that the testimony was based on Snyder's personal knowledge; that Snyder never recanted her testimony; and that her marriage to petitioner was the reason she was unavailable (Pet. App. A12-A14; 7/17/84 Tr. 3-6). Emphasizing that its

holding was narrow and that it was not sanctioning the introduction of all grand jury testimony whenever the witness is unavailable, the court of appeals also concluded that, on the particular facts before it, the testimony bore "particularized guarantees of trustworthiness" (see *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980) (footnote omitted)). Admission of the testimony therefore did not violate petitioner's rights under the Confrontation Clause. Pet. App. A15-A19.

The court of appeals also rejected the other two arguments that petitioner raises in his petition. The court held that the district court had not abused its discretion in admitting the testimony and summary exhibit of the government's "expert summary witness" (Pet. App. A21-A24). And the court held that the district court had not committed plain error by delivering an "*Allen*" charge (see *Allen* v. *United States*, 164 U.S. 492 (1896)) without objection from petitioner (Pet. App. A27-A29).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is therefore not warranted.

1. Petitioner first contends (Pet. 23-49) that the admission into evidence of Kathleen Snyder's grand jury testimony was not permitted by Rule 804(b)(5) of the Federal Rules of Evidence and was prohibited by the Confrontation Clause of the Sixth Amendment.

Rule 804 of the Federal Rules of Evidence sets forth the instances in which hearsay statements by an unavailable declarant may be admitted. Rule 804(b)(5) provides that a hearsay statement not covered by any of the exceptions set forth in subsections (b)(1) through (4) "but having equivalent circumstantial guarantees of trustworthiness" may be admitted into evidence

> if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement

> is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

As the court of appeals noted (Pet. App. A8-A10), the circuits are in general agreement that grand jury testimony may be admitted under Rule 804(b)(5) in proper circumstances. See, *e.g.*, *United States* v. *Young Brothers, Inc.*, 728 F.2d 682, 692 n.11 (5th Cir.), cert. denied, 469 U.S. 881 (1984); *United States* v. *Barlow*, 693 F.2d at 960-963 (discussing cases); *United States* v. *Boulahanis*, 677 F.2d 586, 588-589 (7th Cir.), cert. denied, 459 U.S. 1016 (1982); *United States* v. *West*, 574 F.2d 1131, 1135-1136 (4th Cir. 1978); *United States* v. *Garner*, 574 F.2d 1141, 1143-1146 (4th Cir.), cert. denied, 439 U.S. 936 (1978); *United States* v. *Carlson*, 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977).

Petitioner does not argue that such testimony is never admissible under Rule 804(b)(5), or that the decision below conflicts with the decision of any other court of appeals. Instead, he argues that the courts in this case erred in assessing the factors governing admissibility under the rule. Both the district court and the court of appeals, however, carefully reviewed the circumstances surrounding Snyder's grand jury testimony and held that it satisfied all the requirements of Rule 804(b)(5). They also found that Snyder's testimony was accompanied by substantial guarantees of trustworthiness, since it was corroborated by the trial testimony of other witnesses, including that of petitioner (compare 7/17/84 Tr. 20-73 with 7/18/84 Tr. 165-236). In addition, the lower courts noted that Snyder's testimony was given under oath and that it concerned facts within her personal knowledge. Finally, the courts observed that Snyder had no motive to testify

falsely and, if anything, had made an effort to exculpate petitioner (see Pet. App. A13-A14).[1] Accordingly, they concluded that the admission of Snyder's testimony complied with Rule 804(b)(5). The considerations recited by the district court and the court of appeals amply support admission of Snyder's testimony under Rule 804(b)(5); that fact-bound determination does not present any important question that warrants review by this Court.

Nor did the admission of Snyder's testimony violate the Sixth Amendment. It is well-established that the Confrontation Clause does not bar the use of all hearsay evidence at trial (*Ohio* v. *Roberts*, 448 U.S. at 63), nor does it automatically bar the use of hearsay evidence just because the defendant had no opportunity to examine the declarant. See, *e.g.*, *Dutton* v. *Evans*, 400 U.S. 74 (1970) (co-conspirator declarations); *Mattox* v. *United States*, 156 U.S. 237 (1895) (dying declarations). A defendant's right to confront witnesses must be balanced against society's "strong interest in effective law enforcement" (*Ohio* v. *Roberts*, 448 U.S. at 64). The balance is struck in favor of admissibility when the declarant is unavailable and his statement "bears adequate 'indicia of reliability' " (*id.* at 66). Reliability, the Court stated, can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, "the evidence must be excluded, at least absent a showing of par-

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[1] Petitioner asserts (Pet. 45-46) that a high degree of corroboration was required in this case because Kathleen Snyder's grand jury testimony related "evidence of criminal activity"—*i.e.*, that a large amount of cash was raised by Marchini Construction Company through the cashing of checks and that some of that money was paid to employees, although no record of the cash payments was kept. But this testimony was corroborated by the trial testimony of petitioner himself (7/18/84 Tr. 223). And, in any event, declarations by a witness concerning his or her involvement in criminal activity are usually regarded as *more* rather than less reliable than declarations about other matters. See Fed. R. Evid. 804(b)(3).

ticularized guarantees of trustworthiness" (*ibid.* (footnote omitted)). In this case, after scrupulously studying the record, both courts found particularized guarantees of trustworthiness with respect to Kathleen Snyder's grand jury testimony, for essentially the same reasons that supported the admission of the evidence under Rule 804(b)(5).[2] Those fact-bound determinations do not merit further review.[3]

Besides being based on a particularized assessment of the reliability of Snyder's testimony, the ruling of the court of appeals on the Confrontation Clause issue does not warrant review for another reason: the court's holding was narrowly confined to cases in which the grand jury testimony at issue is that of a witness-spouse who is

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[2] The court of appeals was careful to indicate that it was not establishing a per se rule that evidence admissible under Rule 804(b)(5) can always be admitted without violating the Confrontation Clause (Pet. App. A16-A17). The court required a "case-by-case analysis" (*id.* at A17), but it found that the facts of this case supported a determination that there were adequate indicia of reliability to satisfy the Confrontation Clause.

[3] There is no conflict among the circuits on the question whether the admission of grand jury testimony under Fed. R. Evid. 804(b)(5) violates the Confrontation Clause. In *United States* v. *Thevis*, 665 F.2d 616, cert. denied, 456 U.S. 1008 (1982), the Fifth Circuit did not reach the question whether the grand jury testimony in that case was properly admitted on other grounds (665 F.2d at 629). The *Thevis* court found that, by his conduct, the defendant had waived his rights under both the hearsay rules and the Sixth Amendment (*id.* at 630-633). The Fifth Circuit has subsequently stated that, even in the absence of a waiver, grand jury testimony may be admitted if it meets "the stringent reliability standards" of Rule 804(b)(5). *United States* v. *Young Brothers, Inc.*, 728 F.2d 682, 692 n.11 (5th Cir.), cert. denied, 469 U.S. 881 (1984). The Fifth Circuit also found it unnecessary to reach the issue in *United States* v. *Gonzalez*, 559 F.2d 1271 (1977). The court there simply held that the particular grand jury testimony at issue in that case lacked sufficient guarantees of trustworthiness to be admissible under Rule 804(b)(5) (559 F.2d at 1273).

unavailable solely because of the invocation of the marital privilege (Pet. App. A18-A19). The court of appeals noted that, in asserting the marital privilege at trial, Snyder "was acting in cooperation with [petitioner]" (*id.* at A18). As the court explained, it was petitioner's counsel who "discussed the privilege with [Snyder] and represented to the court that she would invoke her privilege" (*ibid.*). In that setting, although the witness-spouse may be technically "unavailable" for direct or cross-examination by the defendant, the defendant is likely to have a significant degree of control over whether the witness elects to testify. That appears to have been the case here, where petitioner married the witness after her grand jury testimony and before trial, and where the witness-spouse was "acting in cooperation" with petitioner in asserting her privilege. Limited as it was to that narrow factual setting, the court's ruling broke no new ground on the Confrontation Clause issue and did not put the Ninth Circuit into conflict with any other court.

Finally, review in this case would be inappropriate because the admission of Snyder's testimony, if error, was harmless beyond a reasonable doubt. As the courts below found, Snyder's testimony was confirmed by every witness who testified in this case and was corroborated by petitioner's own testimony.[4] If anything, her testimony reflected efforts to exculpate petitioner (Pet. App. A13). In short, even without Snyder's testimony, there could be no doubt about petitioner's guilt.

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[4] The court of appeals described Snyder's testimony as "cumulative" (Pet. App. A14). It is true, as petitioner points out (Pet. 48), that in the same sentence the court described her testimony as "unique." The two descriptions, however, are not contradictory. Snyder was uniquely qualified to describe her own actions in cashing several false supplier checks at petitioner's request (7/17/84 Tr. 35-67), but those actions were merely cumulative evidence of petitioner's guilt.

2. Petitioner also contends (Pet. 49-55) that the district court abused its discretion by admitting the testimony and summary exhibit of the government's "expert summary witness." Petitioner cites no case law to support his contention, and numerous circuits have approved the use of summary witness testimony when the witness has based his summary on the evidence adduced at trial and is available for cross-examination. See, *e.g.*, *United States* v. *Harenberg*, 732 F.2d 1507, 1513-1514 (10th Cir. 1984); *United States* v. *Scales*, 594 F.2d 558, 563 (6th Cir.), cert. denied, 441 U.S. 946 (1979); *United States* v. *Genser*, 582 F.2d 292, 298-299 (3d Cir. 1978), cert. denied, 444 U.S. 928 (1979); *United States* v. *Schafer*, 580 F.2d 774, 778 (5th Cir.), cert. denied, 439 U.S. 970 (1978); *United States* v. *Esser*, 520 F.2d 213, 218 (7th Cir. 1975), cert. denied, 426 U.S. 947 (1976); see also Fed. R. Evid. 702-704, 1006.

In the present case, the government's summary witness qualified as an expert witness (7/17/84 Tr. 124), his calculations were based on the evidence presented at trial (*id.* at 124-126), and he was thoroughly cross-examined (*id.* at 143-151). In these circumstances, the district court did not abuse its discretion by admitting the expert witness's testimony and summary chart. Essentially, the summary expert witness testified that he concluded from the evidence that petitioner had omitted wages from the tax returns at issue. He also explained that his calculation of the amount of the underreported wages was based on doubling the amount of wages paid by check, since he assumed from the evidence that half the wages had been paid by check and half in cash (Pet. App. A22). But the question whether petitioner paid cash wages was not in dispute, since petitioner admitted that all the false supplier checks were used to pay cash wages (7/18/84 Tr. 223). Petitioner also admitted that he failed to report those wages on the pertinent tax returns that his company was required to file (Pet. App. A3-A4). Finally, petitioner

admitted at trial (7/18/84 Tr. 229-230; Pet. App. A24) that it was fair to assume that half the wages were paid by check and half in cash. Accordingly, the only real question for the jury was petitioner's intent, and the government's expert witness offered no opinion on that issue.

3. Finally, petitioner contends (Pet. 55-58) that the district court erred in delivering an "*Allen*" instruction. Since petitioner failed to object to the instruction, any error must be reviewed under the plain error doctrine of Rule 52(b) of the Federal Rules of Criminal Procedure. The power granted to courts of appeals by that rule is to be used only in exceptional circumstances where the error is " 'particularly egregious.' " *United States* v. *Young*, 470 U.S. 1, 15 (1985) (quoting *United States* v. *Frady*, 456 U.S. 152, 163 (1982)). To constitute plain error, the error must be obvious or must "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). As the court of appeals correctly determined, there was no such error in this case.

Although the court of appeals acknowledged that it has " 'long recognized that injection of fiscal concerns into jury deliberations has potential for abuse' " (Pet. App. A29 (quoting *United States* v. *Mason*, 658 F.2d 1263, 1267 (9th Cir. 1981))), it also noted that it has repeatedly upheld the type of "*Allen*" instruction delivered in this case.[5] See *United States* v. *Seawell*, 583 F.2d 416, 417-418 n.2 (9th Cir.), cert. denied, 439 U.S. 991 (1978); see also *United States* v. *Arbelaez*, 719 F.2d 1453, 1461 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984); *Kawakita* v. *United States*, 190 F.2d 506, 524 n.17 (9th Cir. 1951) ("*Allen*"

[5] In part, the district court encouraged the members of the jury to reconsider their positions and the evidence with proper deference to the opinions of the majority, but it emphasized that the jurors should not surrender their honest convictions simply because other jurors differed (Pet. App. A27-A28). Petitioner concedes as much (Pet. 57).

charge referring to expense of trial not coercive), aff'd, 343 U.S. 717 (1952). Other courts have also approved the type of instruction that was given here. *United States* v. *Anderton,* 679 F.2d 1199, 1203-1204 (5th Cir. 1982); *United States* v. *Giacalone,* 588 F.2d 1158, 1166-1167 (6th Cir. 1978), cert. denied, 441 U.S. 944 (1979); *United States* v. *Stover,* 565 F.2d 1010, 1014 (8th Cir. 1977). In light of these precedents, the court of appeals correctly found no plain error in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1987

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